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Synopsis

SIGNIFICANT DEVELOPMENTS IN THE IMMIGRATION LAWS OF THE UNITED STATES 1980-1981

INTRODUCTION

This synopsis of developments in the field of immigration law focuses on the areas of the law in which there were significant changes from October, 1980 through September, 1981. The discussion includes important judicial decisions, significant administrative actions taken by the Immigration and Naturalization Service (INS) and the Board of Immigration Appeals (BIA), and a summary of proposed legislation. The synopsis should serve as a guide to further research in the immigration laws of the United States.

UNITED STATES SUPREME COURT DECISIONS

During the 1980-1981 term, the Supreme Court decided three cases\(^1\) in the area of immigration law and granted certiorari in two others.\(^2\) The Court noted probable jurisdiction in two cases\(^3\)


2. *Chadha v. INS*, 634 F.2d 408 (9th Cir. 1980), cert. granted, 50 U.S.L.W. 3211 (U.S. October 6, 1981) (80-1832). See notes 197-213 infra and accompanying text. *Tapia-Acuna v. INS*, 620 F.2d 311 (9th Cir. 1980), cert. granted, 449 U.S. 945 (1981). In addition to granting certiorari, the Court vacated the lower court decision and remanded the case to the Ninth Circuit for further consideration. See notes 118-131 infra and accompanying text.
which it consolidated. In addition, the Court denied review in thirteen other significant cases in various areas of immigration law.\(^4\)

**Fedorenko v. United States**

*Fedorenko v. United States*,\(^5\) involved an alien who failed to disclose in his application for a United States visa that he had served as a concentration camp guard. In a 7-2 decision, the Court held that this failure to disclose rendered his citizenship revocable as "illegally procured." Furthermore, the Court held that a district court lacks equitable discretion to refrain from entering a judgment of denaturalization against a naturalized citizen whose citizenship was procured illegally.

*Fedorenko* was admitted to the United States in 1949 under the Displaced Persons Act (DPA).\(^6\) His visa, issued under the Act, was based on an application which concealed the fact that he was a concentration camp guard during the Second World War.\(^7\) Following his admission, Fedorenko led a law-abiding life as a factory worker. When he applied for naturalization in 1969, he did not disclose his service as a concentration camp guard. Fedorenko's petition for naturalization was granted and he became an American citizen in 1970.\(^8\) Seven years later the Government brought an action in the United States District Court to revoke Fedorenko's citizenship. The Government alleged that he had willfully misrepresented information about his service as an armed guard in his applications for a DPA visa and for citizenship. Therefore, Fedorenko had procured his naturalization illegally or by willfully misrepresenting material facts.\(^9\)

The district court held\(^10\) that Fedorenko had not made a "material misrepresentation" as defined by the Supreme Court in *Chaunt v. United States*.\(^11\) In *Chaunt*, the Supreme Court held that a misrepresentation was material only if it was shown "either


\(^4\) For a summary of the 13 circuit court decisions which were denied review, and the 15 decisions for which petitions are pending, see 58 INTERPRETER RELEASES 440-44 (1981).


\(^7\) 449 U.S. at 496.

\(^8\) *Id.* at 497.

\(^9\) *Id.* at 497-98.


(1) that facts suppressed which, if known, would have warranted denial of citizenship or (2) that their disclosure might have been useful in an investigation possibly leading to the discovery of other facts warranting denial of citizenship.”

Furthermore, the district court ruled in Fedorenko that even if the misrepresentations were material, “equitable and mitigating circumstances” required that he be allowed to retain his citizenship. The Fifth Circuit Court of Appeals reversed, holding that the Chaunt test of “materiality” had been satisfied and that the district court lacked the authority to excuse “the fraudulent procurement of citizenship” under the denaturalization statute.

The Supreme Court upheld the decision of the Fifth Circuit, but it disagreed with both of the lower courts on the applicability of the Chaunt materiality test. Chaunt involved willfull misrepresentations made in citizenship applications. In Fedorenko the misrepresentation was contained in the petitioner's visa application. The Court held that the materiality of a misrepresentation in a visa application must be measured in terms of its effect on the admissibility of the applicant into the country. At the very least, a false statement is material if disclosure of the truth would render the applicant ineligible for a visa. The Court concluded, as a matter of law, that disclosure of the true facts about Fedorenko's past history would have made him ineligible for a visa under the DPA. The Court rejected the district court's determination that section 2(a) of the DPA excluded only those

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12. Id. at 355.
13. 455 F. Supp. 893 (S.D. Fla. 1978). The circumstances the District Court pointed to as equitable and mitigating were: (1) the inconclusive nature of the evidence that Fedorenko had committed any war crimes while a concentration camp guard, and (2) the uncontroverted evidence that he had led a law-abiding and responsible life since coming to the U.S. Id. at 920-21.
14. Id.
15. 307 F.2d at 951.
16. Id. at 954.
18. 449 U.S. at 508.
19. Id.
20. Id. at 509.
21. Id.
22. Id. at 514.
23. The DPA § 2, 62 Stat. 1009, incorporated the definition of “refugees or displaced persons” contained in Annex I to the Constitution of the International Refugee Organization of the United Nations (IRO). 62 Stat. 3037-3055 (1946). The IRO Constitution was ratified by the United States and provided that the following persons would not be eligible for refugee or displaced person status:
persons who *voluntarily* assisted in the persecution of civilians.\(^2\)

The conclusion that Fedorenko was ineligible for a DPA visa allowed the Court to decide the case on statutory grounds.\(^2\) Without a valid immigrant visa, Fedorenko could not have legally obtained permanent residence,\(^2\) which is a prerequisite to citizenship.\(^2\) Because Fedorenko failed to comply with the statutory prerequisites, his certificate of citizenship was revocable as "illegally procured."\(^2\)

The Court also rejected the argument that a district court in a denaturalization proceeding has discretion to weigh the equities in determining whether citizenship should be revoked.\(^2\) The Court agreed with the petitioner that a denaturalization is a suit in equity.\(^3\) Nevertheless, the Court held that once a district court determines that citizenship has been illegally procured, that court has no discretion to avoid the statutory mandate of Congress.\(^3\)

United States v. Cortez

In *United States v. Cortez*,\(^3\) the Supreme Court reversed a Ninth Circuit decision that overturned the convictions of two indi-

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1. War criminals, quislings and traitors.
2. Any other person who can be shown:
   - (a) to have assisted the enemy in persecuting civil populations of countries, Members of the United Nations; or
   - (b) to have voluntarily assisted the enemy forces since the outbreak of the second world war in their operations against the United Nations.


24. 449 U.S. at 512. The Court observed that had Congress felt a "voluntary-ness" requirement was necessary in § 2(a), it could have included one as it did in § 2(b), which excludes from eligibility for a DPA visa only those who "voluntarily assisted the enemy forces . . . in their operations. . . ." See note 23 *supra*.


26. At the time Fedorenko entered the United States in 1949, § 13(a) of the Immigration and Nationality Act of 1924, ch. 190, 43 Stat. 153, 161 provided that "[N]o immigrant shall be admitted to the United States unless he (i) has an unexpired immigration visa. . . ." Although the 1924 Act was repealed in 1952, the same requirement is now contained in 8 U.S.C. § 1181(a) (1976).

27. 8 U.S.C. § 1429 (1976) states: "[N]o person shall be naturalized unless he has been lawfully admitted to the United States for permanent residence in accordance with all applicable provisions of this Act." See also 8 U.S.C. § 1427(a) (1976).

28. 8 U.S.C. § 1451(a) (1976) provides in pertinent part:

   It shall be the duty of the United States attorneys . . . to institute pro-
   ceedings . . . for the purpose of revoking and setting aside the order ad-
   mitting such person to citizenship and canceling the certificate of naturaliza-
   tion on the ground that such order and certificate of naturaliza-
   tion were illegally procured or were procured by concealment of a mate-
   rial fact or by willful misrepresentation. . . .

29. 449 U.S. at 517.
30. *Id.* at 516.
31. *Id.* at 517.
individuals for knowingly transporting illegal aliens in violation of section 274(a)(2) of the Immigration and Nationality Act (INA). The convictions were based on evidence produced from a vehicle stop which the Ninth Circuit found to be solely the product of a "profile" and therefore illegal.

The decision to stop the Cortez vehicle was based in part on the Border Patrol officers' objective observations and in part on the inferences which the officers drew from those observations. Although the Ninth Circuit felt that the stop was the result of too many "innocent inferences," the Supreme Court disagreed. The Court noted that the Fourth Amendment predicate for a brief investigatory stop, as outlined in Terry v. Ohio, is a reasonable suspicion that the particular person stopped is engaged in wrongdoing. The existence of a reasonable suspicion is determined by taking into account the totality of the circumstances.

The Court stressed the training and experience of the detaining officers. Trained law enforcement officers can combine objective facts, meaningless to the layman, with permissible inferences and deductions from those facts, to form a legitimate, particularized and objective suspicion that an individual is engaged in criminal

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35. Based on their observations of distinctive footprints in the desert and on their knowledge of alien-smuggling patterns in the area, the officers deduced that someone was leading groups of 8 to 20 persons from the Mexican border to an isolated point 30 miles north on an east-west highway. From their discovery of similar footprints in the same area over a period of time, the officers surmised that the smuggling operation generally occurred on clear weekend nights between 2 a.m. and 6 a.m. The officers also observed that when the groups came within 75 yards of the highway, they turned and walked eastward, parallel to the road. This pattern led the officers to conclude that a pick-up vehicle would approach from the east, and that after the pick up, it would return to the east.

On the night that the officers had deduced the operation would next occur, they positioned themselves along the highway about 30 miles east of the suspected pick-up point. During a five hour surveillance, only two vehicles suitable for smuggling sizable groups of aliens passed the officers heading west. One of these vehicles passed by the officers again, heading east, within the time calculated by the officers for making a round trip to the pickup point. The officers stopped the vehicle, which was driven by Cortez, and noted that the shoe prints of the passenger matched the footprints they had observed in the desert. 449 U.S. at 413-16.

36. 595 F.2d at 508.
37. 392 U.S. 1, 16-19 (1968).
38. 449 U.S. at 417.
39. Id. at 418.
activity. As a result, the Court held that the officers could reasonably conclude that the particular vehicle they stopped was engaged in wrongdoing. The Court also noted the demands of patrolling the border and halting the flow of illegal entrants.

INS v. Wang

The Court decided INS v. Wang in a per curiam opinion. The Wangs had entered the United States in 1970 as nonimmigrants, and remained beyond the authorized date of their visas without permission. After being found deportable in 1974, they applied for, but were denied, adjustment of status under section 245 of the INA. The Wangs' appeal of this ruling was dismissed in 1977 by the Board of Immigration Appeals. The Wangs then filed a motion to reopen the proceedings under section 244 of the Act, which provides for suspension of deportation where deportation would result in "extreme hardship to the alien or to his spouse, parent or child . . . ." The Wangs claimed their two American-born children would suffer educational and economic hardship if the family was deported.

The BIA refused the Wangs' motion, without remanding for a hearing, on the basis that a mere showing of economic detriment does not establish a prima facie case of extreme hardship, and that the loss of educational opportunities to the children did not in itself constitute extreme hardship. The Ninth Circuit Court of Appeals, sitting en banc, reversed the BIA, and remanded the case for a hearing on the merits. The Ninth Circuit found that for the purposes of section 244, extreme hardship could be shown by evidence that the hardship caused by deportation would be "different and more severe" than is ordinarily suffered.

The Supreme Court held that the court of appeals erred on procedural and substantive points. First, by ordering a hearing on the Wangs' motion, the court of appeals circumvented the regulation, which requires applicants for suspension to support by affi-
davit or other evidentiary material the particular facts which the alien claims constitute extreme hardship. The Wangs' allegations were conclusory and unsupported by affidavit, and thus failed to comply with these procedural requirements.\textsuperscript{50} Second, the Court noted that the determination of what constitutes "extreme hardship" is committed by the INA to the Attorney General and his delegates.\textsuperscript{51} The immigration judge below, by finding that neither the Wangs nor their children would suffer extreme hardship as a result of deportation, was acting within his authority. Therefore, the Court held that the Ninth Circuit erred by encroaching on the authority of the Attorney General and his delegates.\textsuperscript{52} Furthermore, the Court observed that the Attorney General and his delegates have the authority, consistent with the exceptional nature of the suspension remedy, to adopt a narrow construction of "extreme hardship". The minimal standard of the Ninth Circuit would be unfair to those awaiting a visa\textsuperscript{53} and would result in a transfer of the administration of hardship cases from the INS to the court of appeals.\textsuperscript{54}

The Supreme Court has noted probable jurisdiction in two cases which it has consolidated for decision in the next term.\textsuperscript{55} \textit{In re Alien Children Education Litigation}\textsuperscript{56} and \textit{Doe v. Plyler},\textsuperscript{57} raise serious questions about the constitutional rights of undocumented aliens, and the lower court opinions will be discussed below.\textsuperscript{58} In addition the Court has granted certiorari in \textit{INS v. new facts to be proved at the reopened hearing and shall be supported by affidavits or other evidentiary material."\textsuperscript{59}}

\begin{itemize}
\item[50.] 450 U.S. at 143.
\item[51.] \textit{Id.} at 144. 8 U.S.C. § 1254 (1976) places the determination of whether deportation would result in extreme hardship "in the opinion of the Attorney General...."
\item[52.] 450 U.S. at 144.
\item[53.] 8 U.S.C. § 1254(d) (1976) provides upon suspension that "unless the alien is an immediate relative within the meaning of section 201(b) the Secretary of State shall reduce by one the number of nonpreference immigrant visas authorized to be issued under section 203(a)(7) for the fiscal year then current."
\item[54.] 450 U.S. at 145-46.
\item[56.] 628 F.2d 448 (5th Cir. 1980), \textit{prob. juris. noted}, 101 S. Ct. 2044 (1981).
\item[58.] \textit{See} notes 61-93 \textit{infra} and accompanying text.
\end{itemize}
In Chadha, the Ninth Circuit struck down as unconstitutional the statutory mechanism by which one house of Congress can veto the Attorney General’s decision to suspend deportation.

**EQUAL PROTECTION RIGHTS OF UNDOCUMENTED ALIENS**

In two recently decided cases, courts have held that the equal protection clause of the fourteenth amendment extends to aliens illegally within the United States. Both decisions enjoined enforcement of section 21.031 of the Texas Education Code, which prohibited the use of state funds to educate children who were neither citizens nor legally admitted aliens.

In *Doe v. Plyler*, the Fifth Circuit held that the statute as applied violated the equal protection clause. A local school district had implemented the policy of section 21.031 by charging $1,000 tuition per year for each child unable to document the legality of his or her presence. The lower court ruled in favor of the class of all undocumented school-age children of Mexican origin residing within the district. The court enjoined the trustees of the school district from applying section 21.031 so as to deny free education to any child on the basis of his or her status as an undocumented Mexican alien.

The Fifth Circuit began by analyzing the applicability of the equal protection clause to undocumented aliens. First, the court noted that fourteenth amendment due process protections extend to undocumented aliens. Second, documented aliens residing in the United States are entitled to the equal protection of the laws as guaranteed by the fourteenth amendment. Third, the court observed that the fourteenth amendment prohibits the states from enacting laws that deny equal protection to “any person within its jurisdiction.” The court thought it clear that undocumented aliens are “persons within the territorial jurisdiction” of

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59. 634 F.2d 408 (9th Cir. 1980), cert. granted, 50 U.S.L.W. 3211 (U.S. October 6, 1981) (80-1832).

60. See notes 197-213 infra and accompanying text.


63. 628 F.2d 448 (5th Cir. 1980), prob. juris. noted, 101 S. Ct. 2044 (1981).

64. 628 F.2d at 450.


68. U.S. Const. amend. XIV.
the state in which they reside. Fourth, the Supreme Court in *Wong Wing v. United States* indicated that the equal protection clause of the fourteenth amendment does extend to undocumented aliens. Finally, the Fifth Circuit felt that logic compelled the conclusion that the fourteenth amendment was intended to afford undocumented aliens equal protection of the laws. If this constitutional mandate were not available to undocumented aliens, there would be nothing to invalidate a state statute which set a penalty for a crime committed by an undocumented alien at several times the level of the penalty assessed against a citizen or legal alien for committing the identical crime.

In determining that section 21.031 as applied was unconstitutional, the Fifth Circuit did not decide whether strict scrutiny would be the appropriate standard of review. Although the court discussed several reasons for adopting a stringent test, it concluded that the statute failed to satisfy even the less strict rational basis standard.

The State argued that section 21.031 as applied through the district tuition policy was necessary to preserve the rights of citizens and lawful permanent residents to an adequate free education. The court rejected this argument on two grounds. First, the court observed that the inclusion of illegal aliens in free public education would not absolutely deprive anyone of a free education and would at most result in a decline in the quality of education for all students. Such a decline does not give rise to a constitutional claim, and therefore adequate free education is not a right but a state-provided benefit. Second, the court felt that a state’s desire to save money could not justify totally excluding from public

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69. 628 F.2d at 454.
70. 163 U.S. 228 (1896).
71. 628 F.2d at 455.
72. Id.
73. Id. at 456 n.20.
74. Id. at 458.
75. The court addressed, but did not answer, whether the complete deprivation of free education amounts to a denial of a fundamental right. The court also noted that the characteristics of the group of excluded undocumented children might be such that suspect status would be proper. Id. at 457-58.
76. Id. at 458.
77. Id. at 459.
79. 628 F.2d at 459.
education children who share similar characteristics with children who were not excluded. The State argued that the excluded children did not share the characteristic of legal presence with the included children. The court noted that this would be a strong point but for the fact that the undocumented children are entitled to equal protection of the law. Therefore, the State may not justify the classification on a mere desire to discriminate.

The court also rejected the argument that denial of a free education would lessen the incentive to enter the United States illegally. The court noted that the number of undocumented aliens who bring their children to the United States is a small percentage of the total number of undocumented aliens in the country. Thus, section 21.031 only dealt with a small part of the problem. In light of the district court's finding that section 21.031 was ineffective in discouraging illegal immigration, the Fifth Circuit concluded that the statute was not rationally related to that goal.

*In re Alien Children Education Litigation* also involved section 21.031. The decision of the district court, which the Fifth Circuit summarily affirmed, held that the statute was unconstitutional on its face. The lower court enjoined Texas from denying free public education to any child based on the child's immigration status.

The district court ruled that the fourteenth amendment's equal protection clause applied to undocumented aliens. The court relied on the factors discussed in *Doe v. Plyler*, and also noted that other federal courts have held that the equal protection clause protected undocumented aliens.

The court felt that a fundamental right, access to education, was effectively denied by the statute. The State did not meet the

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80. *Id.*
81. *Id.* at 460.
82. *Id.*
83. *Id.* at 461.
86. After the lower court's decision was handed down, a panel of the Fifth Circuit granted the State's motion to stay the injunction without opinion. Justice Powell, Circuit Justice for the Fifth Circuit, subsequently vacated the stay. *Certain Named and Unnamed Noncitizen Children and Their Parents v. Texas, 101 S. Ct. 12 (1980).* After the stay was vacated, the Fifth Circuit summarily affirmed the district court in an unpublished decision. 49 U.S.L.W. 3919 (U.S. June 9, 1981) (80-1934).
87. *See* note 63-83 *supra* and accompanying text.
89. 501 F. Supp. at 555, 564.
burden required to justify deprivation of a fundamental right. The State asserted that concern for fiscal integrity is a compelling state interest, but the court did not agree. The court also observed that the State failed to demonstrate how the classification advances the state interest of improving the quality of education in the State of Texas. As such, the court found the classification to be unrelated to the stated objective.

ENTRY AND EXCLUSION

In Plasencia v. Sureck, a permanent resident alien was arrested at the border upon return from a brief visit to Mexico and charged with attempting to smuggle aliens into the United States. The Immigration and Naturalization Service determined in an exclusion proceeding that Plasencia’s return was an “entry”, and therefore she was excludable under 8 U.S.C. § 1182(a)(31). The district court vacated this decision, holding that the INS could only proceed against a permanent resident alien returning from a brief visit abroad in deportation proceedings.

An alien can be excluded only if his coming into the country is a section 101(a)(13) “entry”. As the Ninth Circuit noted on appeal, the Supreme Court has held that the return of a permanent resident alien to the United States can only amount to an “entry” if the trip abroad was “meaningfully interruptive” of the alien’s residence in the United States. Among the criteria listed by the Court which would render an interruption of residence “meaningful” is if the purpose of leaving is to accomplish an end contrary

90. Id. at 582.
91. Id. The court did agree that maintaining the fiscal integrity of the schools is a legitimate state interest.
92. Id. at 583.
93. Id.
94. 637 F.2d 1286 (9th Cir. 1980).
95. 8 U.S.C. § 1182(a)(31) (1976) excludes from admission: “[A]ny alien who at any time shall have, knowingly and for gain, encouraged, induced, assisted, abetted, or aided any other alien to enter or to try to enter the United States in violation of law.”
96. 637 F.2d at 1287.
98. In Rosenberg v. Fleuti, 374 U.S. 449, 462 (1963) the Court noted that the length of the absence, the purpose of the trip and whether the alien had to obtain special travel documents are among the relevant factors for determining whether a departure is “meaningfully interruptive”. See notes 234-241 infra and accompanying text.
to immigration law policies. The INS argued that because the Immigration Judge found Plasencia was attempting to achieve such a contrary object, she made an "entry" and was therefore subject to exclusion proceedings. Because deportation proceedings provide important procedural protections not available in exclusion proceedings, the court disagreed with the Service's characterization of the issue. In the court's view, the question was whether Plasencia was entitled to have the determinations of "entry" and excludability made in a deportation proceeding.

Citing the Supreme Court in *Kwong Hai Chew v. INS* and its own decision in *Maldonado-Sandoval v. INS*, the Ninth Circuit stated that the procedural protections that a permanent resident alien otherwise enjoys cannot be lost simply by making a brief trip abroad. To allow the Service to circumvent the requirements of a deportation proceeding because the alien had made such a trip would be "manifestly unfair". The court also distinguished its decision in *Palatian v. INS*, which the INS argued allows the Service to determine whether the return of a permanent resident alien amounted to an "entry" in an exclusion proceeding. Because Palatian was convicted of smuggling drugs prior to the commencement of exclusion proceedings, the factual basis for his exclusion was litigated in a criminal proceeding which guaranteed Palatian the full array of procedural rights. The court felt that unlike Plasencia, Palatian was not prejudiced by the use of exclusion proceedings. As a result, the Ninth Circuit held that when a permanent resident alien is returning from a trip abroad, and the issue is whether the return is an "entry", the question must be litigated in a deportation proceeding.

The District Court for the District of Kansas faced the problem of indeterminate detention of excludable aliens awaiting deportation. In *Fernandez v. Wilkinson*, the petitioner for a writ of habeas corpus contended that the continued confinement without bail of an excludable refugee violates the fifth amendment due process clause and the eighth amendment proscription of cruel and unusual punishment. The petitioner, a citizen of Cuba, was

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99. 374 U.S. at 462.
100. 637 F.2d at 1288.
102. 518 F.2d 278 (9th Cir. 1975).
103. 637 F.2d at 1288.
104. Id. at 1289.
105. 502 F.2d 1091 (9th Cir. 1974).
106. 637 F.2d at 1289.
107. Id.
108. Id.
among 130,000 Cubans who immigrated to the United States by boat in 1980. He admitted in a primary interview with the INS that he had been imprisoned in Cuba for theft and attempted burglary convictions. An examining officer concluded that the petitioner should be detained pending an exclusion hearing. The petitioner was transferred to the United States Penitentiary at Leavenworth, Kansas, a maximum security institution. An immigration judge concluded during the exclusion hearing that the petitioner was excludable and ordered him deported. Due to the failure of Cuba to respond to diplomatic efforts by the INS to arrange the return of the petitioner and others, the Government could not carry out the deportation order. As a result, the petitioner faced indefinite confinement in a maximum security prison without being charged with or convicted of a crime.110

The district court recognized the settled doctrine that nonentrants do not enjoy the full panoply of rights guaranteed to citizens and alien entrants by the Constitution.111 A legal fiction characterizes excluded and excludable aliens like the petitioner as not having entered the United States. The court rejected the argument that the force of the fiction diminishes as the duration of the imprisonment increases.112 The court could find no authority for the employment of indeterminate detention by the Service, and concluded that its application amounted to an abuse of discretion.113 Nevertheless, the court held that neither the Constitution nor any statute provides protection from this wrong.114 Turning to international law, however, the court found that such arbitrary detention violates fundamental principles of human justice,115 and as such, can be judicially remedied. The court held that when an excluded alien is placed in a maximum security

110. Id. at 788-89.
111. Id. at 790. See also Fiallo v. Bell, 430 U.S. 787 (1977); Mathews v. Diaz, 426 U.S. 67 (1976); Kleindienst v. Mandel, 408 U.S. 753 (1972).
112. 505 F. Supp. at 790.
113. Id. at 792-95.
114. Id. at 785. Pending publication of this Synopsis, the Tenth Circuit Court of Appeals affirmed the decision of the District Court in Fernandez v. Wilkinson, 654 F.2d 1382 (1981). The majority concluded that the continued indefinite detention of Fernandez violated not only international principles of fairness but also the statutory scheme of the INA and the Constitution. Id. at 1389-90.
115. Id. The court cited The Universal Declaration of Human Rights, U.N. Doc. A/801 (1948), and The American Convention of Human Rights, 77 DEP'T STATE BULL. 28 (July 4, 1977), for authority that international law guarantees the right to be free of arbitrary detention.
prison pending actual deportation, that alien may only be placed in such a facility for a determinate period. In addition, the alien must be informed of the maximum length of his detention upon commencement of the term.\textsuperscript{116} The court ordered the termination of the petitioner's confinement within 90 days, and suggested a number of ways by which the Service could comply. The petitioner could be deported, or released on parole under specified conditions. The Service could move the petitioner to a refugee camp, or a procedurally-adequate hearing could be held to determine whether further detention of the petitioner would be necessary because he is likely to abscond, or because he is a threat to security or to the citizens of the country.\textsuperscript{117}

\textbf{SECTION 212(c)}

Section 212(c) of the INA\textsuperscript{118} grants to the Attorney General the discretion to waive certain grounds of inadmissibility for permanent resident aliens who have temporarily traveled abroad and are returning to a lawful domicile unrelinquished for seven consecutive years. In \textit{Tapia-Acuna v. INS},\textsuperscript{119} the Ninth Circuit changed its position on the availability of relief under section 212(c) in deportation cases. The court concluded that such relief can be sought in drug-related cases, and can be granted to an alien who has not departed from and returned to the United States.

Tapia-Acuna, a lawfully admitted permanent resident, was convicted of a drug-related offense in an Arizona state court. In deportation proceedings, an immigration judge found the petitioner deportable under section 241(a)(11)\textsuperscript{120} of the Act, and denied his request for section 212(c) relief.\textsuperscript{121} After an Arizona state court expunged the conviction, Tapia-Acuna moved that the BIA reopen and reconsider his request. The Board denied the motion for two reasons: expungement did not eliminate the conviction for section 241(a)(11) purposes; and in the Ninth Circuit section 212(c)

\begin{itemize}
\item \textsuperscript{116} 505 F. Supp. at 800.
\item \textsuperscript{117} Id.
\item \textsuperscript{118} 8 U.S.C. § 1182(c) (1976) provides:
\begin{quote}
Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provisions of paragraph (1) through (25) and paragraphs (30) and (31) of subsection (a).
\end{quote}
Section 1182(a) describes several classes of aliens excluded from admission.
\item \textsuperscript{119} 640 F.2d 223 (9th Cir. 1981).
\item \textsuperscript{120} 8 U.S.C. § 1251(a)(11) (1976).
\item \textsuperscript{121} 640 F.2d at 223.
\end{itemize}

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relief is not available to an alien deportable under section 241(a)(11). The Ninth Circuit affirmed the BIA decision in an unpublished memorandum. Tapia-Acuna petitioned the Supreme Court for certiorari. The Court granted the petition in a summary order which also vacated the judgment and remanded for reconsideration in light of the Government’s assertion that it was no longer opposed to the availability of section 212(c) relief in drug-related deportation cases.

On remand, the Ninth Circuit observed that while section 212(c) by its language refers only to the admission of aliens subject to exclusion, the provision has long been available in deportation proceedings. The Ninth Circuit in Arias-Uribe v. INS, however, had concluded that an alien deportable under section 241(a)(11) was ineligible for section 212(c) relief. In reversing this position, the court followed the Second Circuit’s decision in Francis v. INS, which held that this interpretation of the scope of section 212(c) violates due process. An alien convicted of a drug-related offense who leaves the country temporarily is eligible for section 212(c) relief upon return. Under Arias-Uribe, however, a similarly situated alien who remains in the country would be ineligible. The Second Circuit could find no rational basis for this distinction, and held in Francis that it was unconstitutional to deny eligibility for section 212(c) relief to aliens deportable under section 241(a)(11) who had not departed from the United States since their drug convictions. The Ninth Circuit agreed that the Arias-Uribe interpretation of section 212(c) created a distinction without a rational basis, and adopted the Francis holding.

In Chiravacharadhikul v. INS, the Fourth Circuit held that in order to qualify for section 212(c) relief, an alien must accumulate the seven year period of unrelinquished lawful domicile after pro-

122. Id. at 224.
123. 620 F.2d 311 (9th Cir. 1980), cert. granted, 101 S. Ct. 344 (1981).
125. 640 F.2d at 224.
127. 466 F.2d 1198 (9th Cir. 1972).
129. 532 F.2d 268 (2d Cir. 1976).
130. 640 F.2d at 224.
131. 532 F.2d at 271-73.
curing permanent resident status. The petitioner was convicted of unlawfully distributing a controlled substance and subsequently ordered deported. At the time of the conviction, the petitioner had lived in the United States continuously for more than seven years. His request for section 212(c) relief was denied, however, because the statutory period had not accrued after he obtained permanent resident status in 1977.133

The Fourth Circuit relied on interpretations of the domicile requirement by the INS134 and the Ninth Circuit135 to uphold the denial of relief. The court noted that for over twenty years the Service has interpreted section 212(c) to require residence in the country for seven years after acquiring permanent resident status.136 In addition, the court cited the Ninth Circuit's holding in Castillo-Felix v. INS,137 which adopted the INS view of the statutory period of section 212(c). Because the Second Circuit rejected this view in Lok v. INS,138 a serious split now exists among the circuits about how to calculate the period of unrelinquished lawful domicile for the purposes of section 212(c).

The BIA ruled in In re Lok139 that lawfulness of the section 212(c) period of unrelinquished domicile ends when the alien has been found to be deportable by an immigration judge. The period will continue only if a timely appeal is filed, and then only until the deportation order is affirmed. Once terminated, the lawfulness of the domicile cannot be revived by a motion to reopen or reconsider or by an action for judicial review unless the reviewing court reverses the decision to deport.

DEPORTATION PROCEDURE

Five significant cases have been decided which further define the procedural aspects of deportation.140 In Obitz v. INS,141 the Ninth Circuit ruled that the INS is not required to reopen a deportation hearing when an alien subject to deportation establishes eligibility for adjustment of status. Obitz, who had entered the country in 1970, admitted in deportation proceedings in 1971 that she was subject to deportation. While under a final order to

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133. Id. at 249.
134. Id. at 250. See In re Newton, L.D. No. 2733 (1979).
135. Castillo-Felix v. INS, 601 F.2d 459 (9th Cir. 1979).
136. 645 F.2d at 250.
137. 601 F.2d at 465.
138. 548 F.2d 37 (2d Cir. 1977).
140. Iran v. INS, 656 F.2d 469 (9th Cir. 1981); Daneshvar v. Chauvin, 644 F.2d 1248 (8th Cir. 1981); Olotoe v. INS, 643 F.2d 679 (9th Cir. 1981); Tejeda-Mata v. INS, 626 F.2d 721 (9th Cir. 1980); Obitz v. INS, 823 F.2d 131 (9th Cir. 1980).
141. 623 F.2d 1331 (9th Cir. 1980).
depart the country by March 18, 1977, Obitz married a United States citizen. After the Immigration Service approved her husband’s visa petition to accord Obitz immediate relative status, she moved to reopen her deportation hearing. In the motion, Obitz alleged that approval by the Service of the visa petition made her statutorily eligible for adjustment of status.\textsuperscript{142}

In reviewing the denial of Obitz’s request by the BIA, the Ninth Circuit disagreed with Obitz on the applicability of \textit{Wang v. INS}\textsuperscript{143} and \textit{Urbano de Malaluan v. INS}\textsuperscript{144} to the facts of her case.\textsuperscript{145} The court observed that while eligibility for suspension of deportation involves a discretionary determination, eligibility for adjustment of status does not.\textsuperscript{146} In \textit{Malaluan} and \textit{Wang}, the Ninth Circuit stated that such a discretionary determination of statutory eligibility for suspension of deportation would be difficult without a hearing.\textsuperscript{147} Because the Service admitted Obitz’s eligibility for adjustment of status, the court found no need to reopen the deportation hearing.\textsuperscript{148}

In \textit{Tejeda-Mata v. INS},\textsuperscript{149} the Ninth Circuit recognized the importance of providing an interpreter to an alien who cannot speak fluent English, when that alien is entitled to a full and fair hearing prior to deportation. The court found error in the Immigration Judge’s denial of Tejeda-Mata’s request for translation of the testimony of the government’s only witness. Nevertheless, the court held that the error was harmless.\textsuperscript{150}

During the deportation hearing, Tejeda-Mata testified through an interpreter. On cross-examination he admitted telling an immigration officer prior to his arrest that he came from Mexico. When that officer testified (in English), Tejeda-Mata’s counsel requested that the officer’s testimony be translated for Tejeda-Mata by the official interpreter. The immigration judge refused this re-

\begin{footnotesize}
\footnotesize{\textsuperscript{142} Id. at 1332.}
\footnotesize{\textsuperscript{143} 622 F.2d 1341 (9th Cir. 1980), rev’d per curiam, 450 U.S. 139 (1981).}
\footnotesize{\textsuperscript{144} 577 F.2d 589 (9th Cir. 1978).}
\footnotesize{\textsuperscript{145} 623 F.2d at 1332-33.}
\footnotesize{\textsuperscript{146} 8 U.S.C. § 1254(a)(1) (1976) requires that the Attorney General find extreme hardship will result from deportation in order to establish statutory eligibility for suspension of deportation. See notes 214-233 infra and accompanying text. Eligibility for adjustment of status turns on compliance with the fixed standards of 8 U.S.C. § 1255 (1976).}
\footnotesize{\textsuperscript{147} 623 F.2d at 1333.}
\footnotesize{\textsuperscript{148} Id.}
\footnotesize{\textsuperscript{149} 626 F.2d 721 (9th Cir. 1980).}
\footnotesize{\textsuperscript{150} Id. at 726-27.}
\end{footnotesize}
quest, and also counsel's offer to translate the testimony himself. The petitioner-alien appealed, alleging that these refusals constituted a denial of due process.

Because deportation is viewed as a civil proceeding, the Ninth Circuit stated that an alien subject to deportation is not entitled to the full panoply of due process protections accorded to a criminal defendant. When charged with illegal entry, however, an alien is entitled to a full and fair hearing on the issue of deportation. When the alien cannot speak English fluently, considerations of fundamental fairness require that an interpreter be provided. Thus, the court felt that because an official interpreter was present, and the petitioner's counsel offered to interpret, the immigration judge's denial of the request for translation was an abuse of discretion. Nevertheless, the court held that the error was harmless because the untranslated testimony only confirmed Tejeda-Mata's admission of alienage. A new hearing, therefore, would serve no purpose.

The Eighth Circuit Court of Appeals, in \textit{Daneshvar v. Chauvin}, ruled that a district court lacks jurisdiction to review a final order of deportation in a habeas corpus proceeding. An immigration judge had ordered Daneshvar's deportation, but permitted him to leave the country voluntarily. Rather than leave within the time allowed, Daneshvar filed a motion to reopen the deportation proceeding. While the motion was pending, Daneshvar was arrested and jailed pursuant to the deportation order. The alien then petitioned the district court for a writ of

\begin{itemize}
\item[151.] \textit{Id.} at 723.
\item[152.] \textit{Id.} at 725. Abel v. United States, 362 U.S. 217, 237 (1960); Whetstone v. INS, 561 F.2d 1303, 1306 (9th Cir. 1977).
\item[153.] 626 F.2d at 726. Wong Yang Song v. McGrath, 339 U.S. 33, 49-51 (1950); Garcia-Jaramillo v. INS, 604 F.2d 1238, 1239 (9th Cir. 1979).
\item[154.] See Ramirez v. INS, 550 F.2d 560, 565 n.5 (9th Cir. 1977); Leung v. INS, 531 F.2d 168, 168 (3d Cir. 1976); Orozco-Rangel v. INS, 528 F.2d 224 (9th Cir. 1976); Niarchos v. INS, 393 F.2d 509, 511 (7th Cir. 1968); Haidar v. Coomey, 401 F. Supp. 717, 720 (D. Mass. 1974).
\item[155.] 626 F.2d at 726.
\item[156.] \textit{Id.} at 727. This case has been rescheduled for rehearing en banc. 58 \textit{Interpreter Releases} 608 (1981). The decision to reschedule was perhaps influenced by the strong dissent of Judge Ferguson. The dissent viewed an alien's right to understand the proceedings against him as a basic constitutional right. Judge Ferguson felt that since presence is meaningless without comprehension, a violation of this right could never be characterized as harmless error.
\item[157.] 644 F.2d 1248 (8th Cir. 1981).
\item[158.] 8 U.S.C. § 1254(e) (1976) provides that an alien under deportation proceedings be permitted: "to depart voluntarily from the United States at his own expense in lieu of deportation if such alien shall establish . . . that he is, and has been, a person of good moral character for at least five years immediately preceding his application for voluntary departure under this subsection."
\item[159.] 644 F.2d at 1248-49.
\end{itemize}
habeas corpus, claiming the final order of deportation deprived him of liberty without due process.\textsuperscript{160} The district court held that its habeas corpus jurisdiction was limited\textsuperscript{161} and that only the courts of appeals could review the final order of deportation.

In determining the scope of the district court's habeas corpus jurisdiction, the Eighth Circuit considered a question of statutory interpretation. Section 279 of the Immigration and Nationality Act of 1952\textsuperscript{162} grants jurisdiction to the district courts in all civil and criminal cases arising under the immigration title of the Act.\textsuperscript{163} In 1961, however, section 106(a)\textsuperscript{164} was added to the Act. Section 106(a) provides that the "sole and exclusive" procedure for judicial review of a final order of deportation is the petition for review in a court of appeals. The Eighth Circuit cited the United States Supreme Court decision in \textit{Foti v. INS}\textsuperscript{165} as authority for rejecting Daneshvar's contention that section 279 was the applicable provision. The Supreme Court in \textit{Foti} noted that by enacting section 106(a), Congress intended to prevent dilatory tactics by eliminating the first step in the process of judicial review.\textsuperscript{166}

The Eighth Circuit then addressed Daneshvar's argument that section 106(a)(9)\textsuperscript{167} excepted habeas corpus proceedings from the general rule of appellate court exclusivity. While the court agreed that the section, on its face, would support that interpretation, the court refused to adopt it. The court felt that to read section 106(a)(9) as Daneshvar urged would result in the exception swallowing the rule. "Custody" in the habeas corpus context includes the restriction of movement resulting from any final order of deportation. If the view that section 106(a) only applies to those not in custody were adopted, the exclusive jurisdiction of the courts

\begin{itemize}
\item \textsuperscript{160} \textit{Id.} at 1249. Daneshvar based this claim, among other reasons, on his inability to understand the nature of the proceedings against him because he did not speak fluent English.
\item \textsuperscript{161} \textit{Id.} The district court concluded that under its habeas corpus jurisdiction it could only review ancillary or preliminary actions of the INS.
\item \textsuperscript{162} 8 U.S.C. \S\ 1329 (1976) provides: "The district courts of the United States shall have jurisdiction of all causes, civil and criminal, arising under any of the provisions of this subchapter."
\item \textsuperscript{163} 8 U.S.C. \S\S\ 1151-1363 (1976).
\item \textsuperscript{164} 8 U.S.C. \S\ 1105a(a) (1976).
\item \textsuperscript{165} 365 U.S. 217 (1963).
\item \textsuperscript{166} \textit{Id.} at 230.
\item \textsuperscript{167} 8 U.S.C. \S\ 1105a(a)(9) (1976) provides: "(a) any alien held in custody pursuant to an order of deportation may obtain judicial review thereof by habeas corpus proceedings."
\end{itemize}
of appeals would be eliminated. The court found instead that the exception of section 106(a)(9) should be limited to review of the denial of discretionary relief where the deportability of the alien is not in question.\textsuperscript{168}

Section 246(a) of the Immigration and Nationality Act\textsuperscript{169} imposes a five-year statute of limitations on rescission of permanent residence achieved by adjustment of status. In \textit{Oloteo v. INS},\textsuperscript{170} the issue before the Ninth Circuit was whether section 246(a) applies to deportation proceedings brought on the ground of ineligibility at the time permanent resident status was obtained. Oloteo was admitted as a lawful permanent resident in 1969 on the basis of his claimed status as an unmarried child of a permanent resident. Oloteo’s wife, by a marriage allegedly occurring after his entry, was later granted preference status and admitted as a permanent resident. More than five years after the entry of Oloteo’s wife, the immigration service discovered that the couple had been married prior to Oloteo’s entry.\textsuperscript{171} The Oloteos claimed that the subsequent deportation proceedings\textsuperscript{172} were barred by section 246.\textsuperscript{173}

The court refused to extend the statute of limitations on rescission of adjustment of status proceedings to deportation proceedings. There is a clear distinction between the two, and the court found the statutory language to be a clear indication that section 246(a) applies only to the rescission of adjusted status.\textsuperscript{174} The Oloteos argued that Congress intended the time-bar to apply to deportation proceedings against adjusted status aliens brought on the ground of ineligibility at the time adjusted status was granted.\textsuperscript{175} Because this would provide the benefit of a limitation on deportation to adjusted status aliens that is not available to immigrating aliens, the Oloteos would be denied the equal protec-

\textsuperscript{168.} 644 F.2d at 1250-51. 
\textsuperscript{169.} 8 U.S.C. § 1256(a) (1976). 
\textsuperscript{170.} 643 F.2d 679 (9th Cir. 1981). 
\textsuperscript{171.} Id. at 680. 
\textsuperscript{172.} This misrepresentation was grounds for deportation under 8 U.S.C. § 1251(a)(1) (1976) because the Oloteos’ entry visas had been obtained by fraud, contrary to 8 U.S.C. § 1182(a)(19) (1976). 
\textsuperscript{173.} 643 F.2d at 680. 
\textsuperscript{174.} Id. at 682. 8 U.S.C. § 1256(a) provides in part: “[A]t any time within five years after the status of a person has been otherwise adjusted under the provisions of section 1255 . . . the Attorney General shall rescind the action taken . . . .” 
\textsuperscript{175.} This argument was also recently rejected in an administrative decision. In \textit{In re Belenzo}, I.D. No. 2793 (1981), the Attorney General ruled that the five-year time-bar of § 246 does not bar deportation proceedings against adjusted aliens, even where the asserted grounds for deportation are acts committed in procuring the adjustment. For a more comprehensive discussion of this decision, see 58 \textit{INTERPRETER RELEASES} 360-62 (1981).
tation of the laws.\textsuperscript{176} Without reaching the constitutional question, the Ninth Circuit rejected the suggestion that Congress intended section 246(a) to apply in any way to deportation proceedings.\textsuperscript{177} Beyond the clear language of the statute, the court noted that Congress had expressly done away with periods of limitation during which deportation proceedings may be commenced.\textsuperscript{178} In addition, the court relied on an administrative ruling of the Attorney General that section 246(a) did not bar exclusion or deportation proceedings commenced more than five years after adjustment of status.\textsuperscript{179}

In \textit{Iran v. INS},\textsuperscript{180} the Ninth Circuit held that the presumption of illegal entry in 8 U.S.C. § 1361\textsuperscript{181} must be read to apply only in deportation proceedings involving illegal entry. The petitioner entered the United States as a non-immigrant visitor authorized to remain for 6 months, but remained beyond that period.\textsuperscript{182} The court observed that in a deportation proceeding, the INS has the burden of proving the subject's deportability by "clear, unequivocal and convincing evidence."\textsuperscript{183} Proof of deportability involves two steps. The INS must show that the subject of the proceeding is an alien, and then that the subject is deportable under the Immigration and Nationality Act.\textsuperscript{184} In cases involving illegal entry, once the INS proves the subject's alienage, the presumption of illegal entry applies. 8 U.S.C. § 1361 places on the subject of the proceeding the burden of providing the "time, place and manner of his entry."\textsuperscript{185} If the subject fails to meet this burden, as did Iran,\textsuperscript{186} he is presumed to be in the United States illegally and the

\begin{itemize}
\item \textsuperscript{176} 643 F.2d at 682.
\item \textsuperscript{177} Id.
\item \textsuperscript{178} Id. at 683 n.7.
\item \textsuperscript{179} \textit{In re S}, 9 I & N Dec. 548 (1962).
\item \textsuperscript{180} 656 F.2d 469 (9th Cir. 1981).
\item \textsuperscript{181} 8 U.S.C. § 1361 (1976) provides in part:
\begin{quote}
In any deportation proceeding under chapter 5 against any person, the burden of proof shall be upon such person to show the time, place, and manner of his entry into the United States . . . . If such burden of proof is not sustained, such person shall be presumed to be in the United States in violation of law.
\end{quote}
\item \textsuperscript{182} 656 F.2d at 470.
\item \textsuperscript{183} Id. at 471. \textit{Woodby v. INS}, 385 U.S. 276, 277 (1966); 8 C.F.R. 242.14(a) (1981).
\item \textsuperscript{184} 656 F.2d at 471.
\item \textsuperscript{185} Id.
\item \textsuperscript{186} The subject in this case failed to introduce any evidence at his deportation hearing.
\end{itemize}
INS will have met its burden of proving deportability.187

The Ninth Circuit noted that while section 1361 applies to "any deportation proceeding," several reasons required that the section be limited to those cases involving illegal entry.188 First, there is no reason to require proof on the issue in cases not involving illegal entry. Second, section 1361 was enacted as a procedural rule; if it was applied in all deportation cases, it would provide a source of substantive law in cases that do not involve illegal entry. Third, to apply section 1361 when illegal entry is not an element of the charge of deportability would offend due process.189 Thus, the Ninth Circuit concluded that section 1361 must be interpreted to apply only in those cases where illegal entry is at issue.190

Suspension of Deportation

In addition to the Supreme Court opinion in INS v. Wang,191 several judicial and administrative decisions have considered the procedure for suspension of deportation. These decisions have addressed each of the three statutory requirements of section 244(a)192 which the alien must meet in order to be eligible for suspension of deportation.193 Once an alien establishes statutory eligibility, the Attorney General has discretion to suspend the deportation.194 A discretionary grant is then subject to veto by either house of Congress.195 A major decision, which will be reviewed by the Supreme Court, held that the legislative veto violates the separation of powers doctrine.196

187. Id.
188. Id.
189. Whetstone v. INS, 561 F.2d 1303, 1306 (9th Cir. 1977).
190. 656 F.2d at 472.
193. Id. § 1254(a) (1) extends eligibility for suspension of deportation to a deportable alien who:

   has been physically present in the United States for a continuous period of not less than seven years immediately preceding the date of such application, and proves that during all of such period he was and is a person of good moral character; and is a person whose deportation would, in the opinion of the Attorney General, result in extreme hardship to the alien or to his spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence ....

194. Id. § 1254(a). Vaughn v. INS, 643 F.2d 35 (1st Cir. 1981), discusses the nature of this discretion.
195. 8 U.S.C. § 1254(c) (2).
Congressional Power to Veto Suspension of Deportation

In Chadha v. INS the Ninth Circuit ruled that section 244(c)(2) of the Immigration and Nationality Act is unconstitutional as a violation of separation of powers. By analyzing the impact of this statutory mechanism on the attainment of legislative goals, the court found that unicameral disapproval interfered with essential functions of the judicial and the executive branches.

Chadha lawfully entered the United States as a nonimmigrant student, and two years after his visa expired, a deportation hearing was conducted. After conceding his deportability, Chadha sought suspension of his deportation under section 244(a)(1). The immigration judge found that Chadha met the statutory requirements and granted his request for suspension pending congressional action. After the House of Representatives disapproved the suspension of Chadha's deportation, proceedings were reconvened and the INS entered a final order of deportation.

On appeal, the Ninth Circuit began by noting that the separation of powers doctrine had two purposes: to prevent dangerous concentrations of power and to promote efficient administration of the nation. In light of these objectives, the court formulated the standard of review for a violation of separation of powers. The assumption by one of the coordinate branches of essential powers of another branch, if that assumption is both disruptive and unnecessary to achieve a legislative goal, would constitute a violation of the doctrine.

In applying the standard to section 244(c)(2), the court considered three possible purposes for the disapproval process. First, congressional disapproval could be viewed as a corrective device for administrative or judicial misapplications of the statute. The court found that by assuming this role, the legislature disrupts essential functions of the judiciary in both a vertical and horizontal sense. There is a vertical disruption between the judicial branch and the alien. The legal determination an alien has
obtained through the judicial process may be set aside by the legislature without reason. Therefore, the alien is denied the guarantees of res judicata, stare decisis, and reasoned findings. In addition, the check of the judiciary on the executive is diminished.\textsuperscript{204} There is also a horizontal disruption. The court noted that legislative disapproval interferes with the central function of a coordinate branch by subjecting decisions of the judiciary to review by the legislature. In the court’s view, this departure from the separation of powers doctrine unnecessarily undermines the integrity of the judicial branch. It also disrupts judicial review of administrative decisions for abuse of discretion or error in the application of the law.\textsuperscript{205}

The second possible purpose for the legislative veto is to provide for joint administration of the suspension statute.\textsuperscript{206} The Chadha court found that this role would create a horizontal disruption. The function of the executive branch is to administer legislative enactments in a principled fashion. Through continued administration of the statute, the executive branch develops skill and expertise which adds stability to the administrative process. The court observed that constant legislative interference can thwart this stability and threaten the integrity of the executive process. This problem becomes even more critical when intrusion by the legislature does not lead to changes in the general guidelines of the underlying statute. In Chadha’s case, the legislature failed to specify any reasons for the veto which would aid the Executive in preventing future error. The legislative interference was not an amendment of prior enactments, nor an attempt to change its instructions for the administration of the statute. As a result, the Ninth Circuit found that this horizontal interference disrupted the “efficient administration” purpose of the separation of powers doctrine.\textsuperscript{207}

Finally, the court observed that the disapproval process could be viewed as the legislative exercise of a residual article I power to further define substantive legal rights. This exercise would fall short of statutory amendment, and the disapproval, as a separate legislative procedure, would operate only after administrative and judicial functions have been completed.\textsuperscript{208} In order to support the unicameral character of this process, Congress could point to the broad power it is granted to “make all laws” by article I of the

\textsuperscript{204} Id. at 430-31.
\textsuperscript{205} Id. at 431.
\textsuperscript{206} Id.
\textsuperscript{207} Id. at 432.
\textsuperscript{208} Id. at 433.
Constitution.\textsuperscript{209}

After discussing the importance of the internal check of bicameralism, the court rejected, for three reasons, the argument that article I authorizes the statutory disapproval procedure. First, the court rejected the contention that because one house of Congress can withhold discretionary relief by failing to enact a private bill, one house can also exercise this power after the Executive or Judiciary has already performed its delegated functions. With a private bill, Congress has full administrative responsibility. The court concluded that the power to "make all laws" does not include the authority to revise particular administrative decisions, since the exercise involves an unnecessary disruption of the other two coordinate branches.\textsuperscript{210} Second, the Ninth Circuit expressed the belief that power to make positive law which alters the rights of individuals must be exercised by the House of Representatives and the Senate concurrently.\textsuperscript{211} Third, the court noted the potential for discriminatory treatment of certain individual aliens through improper use of the disapproval process.\textsuperscript{212}

In summary, the Ninth Circuit held section 244(c) (2) to be unconstitutional because the disapproval mechanism violates both purposes of the separation of powers doctrine, and disrupts essential functions of both the executive and judicial branches. The court also rejected the argument that this unicameral procedure was a legitimate exercise of article I power by Congress.\textsuperscript{213}

\textit{Extreme Hardship}

In three opinions written prior to the Supreme Court decision in \textit{INS v. Wang},\textsuperscript{214} the Ninth Circuit discussed some of the factors to be considered in determining whether a particular case satisfies the statutory criteria of extreme hardship. The court held in \textit{De Reynoso v. INS}\textsuperscript{215} that where the only hardship caused by deportation would be a decrease in the standard of living, the Board

\textsuperscript{209} U.S. CONST. art. I.
\textsuperscript{210} 634 F.2d at 434.
\textsuperscript{211} Id.
\textsuperscript{212} Id. at 435.
\textsuperscript{213} For a further analysis of the section 244(c) (2) legislative veto and the separation of powers doctrine, including a discussion of the implications of \textit{Chadha}, see Comment, \textit{Congressional Review of Suspension of Deportation}, 19 SAN DIEGO L. REV. 177 (1981).
\textsuperscript{214} 450 U.S. 139 (1981).
\textsuperscript{215} 627 F.2d 958 (9th Cir. 1980).
of Immigration Appeals did not abuse its discretion in denying relief. In *Carnalla-Munoz v. INS*,\(^{216}\) the Ninth Circuit considered several factors\(^{217}\) presented by the petitioners. The court found that the hardships merely reflected the adjustment required of an alien returning to his homeland and did not constitute extreme hardship.\(^{218}\) In *Miramontes v. INS*,\(^{219}\) the court reaffirmed the principle that economic detriment alone does not establish extreme hardship.

Four cases decided after *Wang* dealt with the extreme hardship standard. In *Perez v. INS*,\(^{220}\) the Ninth Circuit noted that the BIA failed to indicate the factors it considered in determining that the petitioners had not established extreme hardship. The court found this omission precluded even the limited judicial review contemplated by the Supreme Court in *Wang*.\(^{221}\) The Ninth Circuit vacated and remanded the Board's decision, and held that any future BIA decision must be based on a record prepared in accordance with 8 C.F.R. § 103.3.\(^{222}\)

In *Santana-Figueroa v. INS*,\(^{223}\) the Ninth Circuit distinguished between "mere economic detriment" and inability to find any employment. The petitioner conceded deportability, but claimed that deportation would cause him extreme hardship by severing his ties to the community and also by rendering him completely unable to find employment in Mexico. Both an immigration judge and the BIA ruled that the petitioner's hardship was not extreme because it was based primarily on economic factors.\(^{224}\)

The BIA concluded that petitioner's claim amounted to "mere economic detriment". Because deprivation of all means of earning a living can have severe personal and noneconomic consequences, the Ninth Circuit disagreed with the BIA's characterization of the petitioner's claim as a mere "economic"

\(^{216}\) 627 F.2d 1004 (9th Cir. 1980).
\(^{217}\) *Id.* at 1006. The petitioners suggested five factors flowing from the proposed deportation which amounted to extreme hardship: (1) the difficulty in finding employment in Mexico, (2) the impact of leaving the country after establishing firm roots throughout nine years in the United States, (3) the inability to finance their children's education in Mexico, (4) the loss of medical insurance and (5) the forced sale of their home.
\(^{218}\) *Id.* at 1007.
\(^{219}\) 643 F.2d 473 (9th Cir. 1980).
\(^{220}\) 643 F.2d 640 (9th Cir. 1981).
\(^{221}\) *Id.* at 641.
\(^{222}\) *Id.* 8 C.F.R. § 103.3 (1981) provides in part: "(a) Denials and Appeals. Whenever a formal application or petition filed under § 103.2 is denied, the applicant shall be given written notice setting forth the specific reasons for such denial."
\(^{223}\) 644 F.2d 1354 (9th Cir. 1981).
\(^{224}\) *Id.* at 1355.
loss.\textsuperscript{225} Since no finding was made on whether the petitioner could find employment after being deported, the court held that proper consideration was not given to Santana-Figueroa's claim. Because of this abuse of discretion, the Ninth Circuit reversed and remanded the decision of the BIA.\textsuperscript{226}

The Third Circuit Court of Appeals reconsidered a decision in light of the Supreme Court's \textit{Wang} opinion. \textit{Ravancho v. INS}\textsuperscript{227} involved a couple whose request for suspension of deportation was denied for failure to demonstrate that extreme hardship would result. After their appeal of this ruling was denied by the BIA, the Ravanchos filed a motion to reopen the deportation proceedings. In support of the motion, the couple included a psychiatric evaluation of their child which assessed the mental, physical, and emotional effects of a return to the Philippines. Because the Board concluded the psychiatrist's report did not demonstrate the necessary "extreme hardship," it refused to reconsider its earlier denial of suspension of deportation.\textsuperscript{228}

In its original decision, the Third Circuit remanded the case to the BIA because it appeared to the court that the Board considered the psychiatric evaluation in isolation. The court concluded that the failure of the Board to base its decision on the cumulative effect of all the evidence before it was an abuse of discretion.\textsuperscript{229} On rehearing, the Third Circuit observed that \textit{Wang} did not preclude all judicial review in suspension cases, since such review is provided by statute. While the scope of review is limited, it includes a determination of whether the Board exercised its discretion in a procedurally proper manner.\textsuperscript{230} This led the Third Circuit to conclude that its original decision to remand was not foreclosed by \textit{Wang}.\textsuperscript{231}

In \textit{Mejia-Carrillo v. INS},\textsuperscript{232} the Ninth Circuit indicated that in order to properly exercise its discretion in the determination of extreme hardship, the BIA must fully consider all relevant facts. Although economic loss cannot alone establish statutory eligibility for suspension, it is still a factor to be considered. In addition,

\textsuperscript{225} Id. at 1356.
\textsuperscript{226} Id. at 1357.
\textsuperscript{227} 658 F.2d 169 (3d Cir. 1981).
\textsuperscript{228} Id. at 172.
\textsuperscript{229} Id.
\textsuperscript{230} Id. at 176.
\textsuperscript{231} Id. at 170.
\textsuperscript{232} 656 F.2d 520 (9th Cir. 1981).
the court stated that the Board must consider any personal or noneconomic hardship which naturally flows from economic loss, including lost educational opportunities, decreased health care, and material welfare. The Ninth Circuit held that the Board had failed to properly consider these non-economic factors in the petitioner's case, and remanded for reconsideration. 233

Continuity of Physical Presence

In addition to demonstrating extreme hardship, a deportable alien must also prove continuous physical presence in the United States for seven years immediately preceding the request for relief. 234 The Ninth Circuit, in Gallardo v. INS, 235 instructed the BIA to apply the recently developed "meaningfully interruptive" standard 236 to determine whether an alien's departure from the country broke the continuity requirement. In the Ninth Circuit, an absence will not be considered to interrupt the period of physical presence if the hardship of deportation would be equally severe to the alien had there been no absence. 237 Gallardo had been present in the United States for 15 years prior to her application for suspension except for a three and one-half month vacation in 1973. On return from this vacation, she obtained a permit to reenter the country by claiming that she intended to remain only a few days. The court stated that this pretextual entry, standing alone, should not break the period of physical presence. 238 The Ninth Circuit based this conclusion on prior holdings that not every violation of law taints an otherwise innocent absence from the country. 239

In In re Herrera, 240 however, the BIA held that where the purpose of a trip abroad is neither casual nor innocent it constitutes a break in continuous physical presence. The BIA found that Herrera entered into a sham marriage solely for immigration purposes. In furtherance of this scheme, he left the country in order to apply for an immigrant visa as the spouse of a lawful permanent resident. The Board upheld the immigration judge's deter-

233. Id. at 522-23.
235. 624 F.2d 85 (9th Cir. 1980).
236. Chan v. INS, 610 F.2d 651 (9th Cir. 1979); Kamheangpatyoth v. INS, 597 F.2d 1253 (9th Cir. 1979). For a detailed discussion of these decisions, see Synopsis, Significant Developments in the Immigration Laws of the United States 1979-1980, 16 SAN DIEGO L. REV. 107-141 (1980). For further discussion of the "meaningfully interruptive" standard, see notes 97-108 supra and accompanying text.
237. 597 F.2d at 1257.
238. 624 F.2d at 87.
239. Git Foo Wong v. INS, 358 F.2d 151 (9th Cir. 1966).
mination that continuity had been broken, basing its affirmance on the strong policy of preventing sham marriages.\textsuperscript{241}

**Good Moral Character**

In an unpublished decision, *In re Ramirez*,\textsuperscript{242} the BIA clarified the section 244(a)(1)\textsuperscript{243} requirement that an applicant for suspension be of good moral character. An immigration judge denied Ramirez both suspension of deportation and voluntary departure on the ground that she had failed to demonstrate her good moral character. Factors relied on by the judge to reach the conclusion were Ramirez’s failure to report her changes of address to the INS, her false claim of United States citizenship in order to obtain employment, her failure to file any income tax returns, and her claim on an employment application of four dependents when she was only entitled to claim three. In reversing, the Board observed that to prove good moral character, one need not show moral excellence. The circumstances relied on by the judge did not, in the Board’s view, establish that Ramirez had a depraved or calloused conscience.

The BIA also addressed the issue of adultery, as Ramirez had lived with a married man. Section 101(f)(2) of the INA\textsuperscript{244} bars someone who has committed adultery from proving good moral character. Because the case arose in the Third Circuit, the Board applied that circuit’s rule regarding “adultery” as developed in *Brea-Garcia v. INS*.\textsuperscript{245} The rule requires that section 101(f)(2) “adultery” must be defined according to state law. The Board remanded the Ramirez case for a determination of whether her acts constituted adultery under Delaware law.

**Discretion to Deny Relief**

Even if an alien establishes his statutory eligibility for suspension of deportation, the decision to grant the requested relief is still discretionary.\textsuperscript{246} The First Circuit Court of Appeals, in

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\textsuperscript{241} Id. at 6-7.
\textsuperscript{242} File A21 675 716. For a discussion of the decision, see 58 INTERPRETER RENTALS 221-223 (1981).
\textsuperscript{244} Id. § 1101(f)(2).
\textsuperscript{245} 531 F.2d 693 (3d Cir. 1976).
\textsuperscript{246} See note 194 supra and accompanying text.
Vaughn v. INS,247 discussed the nature of this discretion and upheld the decision of the immigration court. Vaughn was denied suspension by an immigration judge who concluded that she had not demonstrated “extreme hardship”. The Board of Immigration Appeals reversed on the ground that Vaughn's deportation would cause extreme hardship to her children. The decision was remanded by the Board to the judge for a finding of whether Vaughn, having met the statutory requirements, was entitled to a favorable exercise of discretion. After another hearing, the immigration judge concluded that Vaughn's total reliance on public assistance, her failure to seek employment, and her refusal to depart the country voluntarily weighed against the exercise of discretion in her favor. The BIA affirmed this decision.248

The First Circuit rejected Vaughn's contention that the BIA abused its discretion by denying her application for suspension. In particular, Vaughn suggested that the Board failed to properly consider the hardship her children would suffer if she was deported. The court countered this argument by noting that the Board's discretion to deny suspension would be meaningless if the court required the relief to be granted automatically upon a showing of extreme hardship.249 In concluding that under the circumstances the Board did not abuse its discretion, the court noted two other factors supporting the denial. First, Vaughn only satisfied the continuity requirement by abusing the privilege to depart voluntarily. Second, the children, who Vaughn relied on to establish extreme hardship, were born while she was illegally in the United States.250

**Voluntary Departure**

Any alien under deportation proceedings can request, pursuant to section 244(e)251 of the INA, the opportunity to voluntarily depart from the United States. To be eligible for this relief, an alien must be able to leave the country immediately at his own expense. The constitutionality of this requirement was challenged

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247. 643 F.2d 35 (1st Cir. 1981).
248. Id. at 36-37.
249. Id. at 37.
250. Id. at 38.
251. 8 U.S.C. 1254(e) (1976) provides:
The Attorney General may, in his discretion, permit any alien under deportation proceedings . . . to depart voluntarily from the United States at his own expense in lieu of deportation if such alien shall establish to the satisfaction of the Attorney General that he is, and has been, a person of good moral character for at least five years immediately preceding his application for voluntary departure under this subsection.
in *U.S. v. Barajas-Guillen*. Barajas-Guillen was found deportable in 1977, and was offered the opportunity to apply for voluntary departure. Because he had no money, he was ineligible for this discretionary relief. After being deported, Barajas-Guillen reentered the country illegally. He was subsequently arrested and convicted for reentry without permission after deportation.

The defendant appealed his conviction on the ground that his prior deportation was unconstitutional. He claimed that the section 244(e) violated the equal protection clause of the fifth amendment by discriminating against two different classes of aliens. First, by granting voluntary departure only to those aliens who can afford it, the statute unconstitutionally discriminates against indigent aliens. Second, 244(e) discriminates against indigent aliens who are “under deportation proceedings” in favor of aliens who depart prior to such proceedings. Section 242(b) of the Act grants the Attorney General the discretion to waive deportation proceedings for any alien and grant voluntary departure at the government’s expense.

The Ninth Circuit responded to the claim that these classifications were unconstitutional by holding that strict judicial scrutiny was inappropriate. In *Castillo-Felix v. INS* the Ninth Circuit had previously held that the interest of a resident alien in permanently remaining in the country is not a “fundamental right”. Because the interest asserted by the defendant was less than that of

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252. 632 F.2d 749 (9th Cir. 1980).
253. Id. at 750.
254. 8 U.S.C. § 1326 (1976) states:

Any alien who—

(1) has been arrested and deported or excluded and deported and thereafter
(2) enters, attempts to enter, or is at any time found in, the United States, unless (A) prior to his reembarkation at a place outside the United States or his application for admission from foreign contiguous territory the Attorney General has expressly consented to such alien’s reapplying for admission; or (B) with respect to an alien previously excluded and deported, unless such alien shall establish that he was not required to obtain such advance consent under this or any prior Act, shall be guilty of a felony, and upon conviction thereof, be punished by imprisonment of not more than two years, or by a fine of not more than $1,000, or both.
255. 632 F.2d at 751.
256. Id.
258. 632 F.2d at 752.
259. 601 F.2d 459 (9th Cir. 1979).
a permanent resident alien, the court concluded that section 244(e) did not affect a “fundamental right”.260

The Ninth Circuit also found that section 244(e) did not create a suspect classification. A classification based on wealth is only suspect when it absolutely deprives an individual from enjoyment of a benefit because of his indigency.261 Under the immigration laws an indigent alien is not absolutely deprived of the opportunity to depart voluntarily. The court observed that prior to the commencement of deportation proceedings, section 242(b) allows an alien to seek voluntary departure at government expense.262

Since no fundamental right or suspect classification could be found, the Ninth Circuit applied a rational relation standard of review. The government stated that the classifications in sections 242(b) and 244(e) were intended to save the government money. The court concluded that Congress could rationally decide to limit government-paid voluntary departure to those aliens whose cases merited dispensing with deportation proceedings.263

ADJUSTMENT OF STATUS

In Pei-Chi Tien v. INS,264 the Fifth Circuit Court of Appeals ruled that an application for adjustment of status is not abandoned by giving up certified employment265 on an intermittent basis. The court also rejected the argument that when an alien accepts unauthorized employment after applying for adjustment, his application is no longer “filed” for purposes of section 245(c) of the INA.266

Tien, a non-immigrant alien, filed an application in January, 1974, for adjustment of status prior to the expiration of his visitor’s visa. The petitioner requested a sixth preference visa267 based on his labor certification as a specialty cook. The application was denied in September, 1976, without specifying reasons

260. 632 F.2d at 753.
262. 632 F.2d at 753.
263. Id.
264. 638 F.2d 1324 (5th Cir. 1981).
265. Applicants for third and sixth preference visas under 8 U.S.C. § 1153(a) (1976) are required by 8 U.S.C. § 1182(a)(14) (1976) to obtain a certification from the Department of Labor. The Secretary of Labor must certify that there is a shortage of workers in the United States able, willing, qualified and available to perform the certificated labor, and that employment of the applicant will not adversely affect wages and working conditions.
266. 8 U.S.C. § 1255(c) (1976) precludes from adjustment any alien who “continues in or accepts unauthorized employment prior to filing an application for adjustment of status . . . .”
and in December 1976, Tien resigned from his job with the restaurant which had obtained the certification. On January 1, 1977, an amendment to section 245(c) of the INA became effective, denying adjustment of status to any alien who continues in or accepts unauthorized employment prior to filing an adjustment application. During 1977, the petitioner worked at a second restaurant and obtained another labor certification. Tien filed a second adjustment of status application based on this new certification, but it was denied. In 1978, the petitioner worked as a house painter. At a deportation proceeding in March 1979, Tien admitted his deportability, but requested that his 1974 adjustment application be renewed. The immigration judge denied this request, and the BIA affirmed, on the ground that the petitioner had abandoned the 1974 application and therefore had violated section 245(c) by engaging in unauthorized employment prior to filing a new application.

Addressing the question of abandonment, the Fifth Circuit observed that an applicant for entry must qualify, at the time action is taken on the application, for the preference relied on when the application was filed. Eligibility for sixth preference requires a valid labor certification. Both the BIA and the immigration judge concluded that a labor certification is valid only so long as the alien is actually employed with the certificated employer.

The court rejected this proposition and instead focused on the intent of the alien and the employer. Because there was an outstanding offer of employment which Tien was willing and able to accept, the court found the necessary intent to maintain the validity of the certificate. Thus the petitioner did not abandon his 1974 adjustment application, and his request for renewal at the

268. 638 F.2d at 1325.
269. See note 3 supra.
270. 638 F.2d at 1326.
271. Id. at 1327. 8 C.F.R. § 245.2(a)(4) (1981) provides for renewal of a previously denied adjustment application in proceedings to determine deportability.
272. 638 F.2d at 1327.
274. See Yui Sing Tse v. INS, 596 F.2d 831, 834 (9th Cir. 1979).
275. See note 265 supra.
276. 638 F.2d at 1328.
277. Id.
deportation proceedings should not have been denied. The Fifth Circuit also disagreed with the contention of the INS that section 245(c)(2) disqualifies from adjustment any alien who engages in employment other than that certificated. The court found no support for this narrow construction in the statutory language or in the legislative history.278

NATURALIZATION

An applicant for naturalization bears the burden of proving his or her "good moral character".279 If the alien had been convicted of a crime of "moral turpitude", or if the alien admits committing such a crime or committing acts which amount to such a crime, then the alien is ineligible for a finding of "good moral character".280 In Nemetz v. INS281 the Fourth Circuit addressed the issue of whether it is proper to look to state law to determine "moral turpitude".

At naturalization proceedings before an INS examiner, Nemetz admitted to having homosexual relations with his male roommate. The examiner recommended that naturalization be denied because Nemetz failed to meet the burden of proof on the issue of good moral character.282 The district court accepted this conclusion, holding that Nemetz failed to rebut the inference that he had committed a crime of moral turpitude as defined by Virginia law.283

The Fourth Circuit noted the competing considerations in the

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278. Id. at 1329.
279. 8 U.S.C. § 1427(a) (1976) states:
(a) No person, except as otherwise provided in this subchapter, shall be naturalized, unless such petitioner, (1) immediately preceding the date of filing his petition for naturalization has resided continuously, after being lawfully admitted for permanent residence, within the United States for at least five years and during the five years immediately preceding the date of filing his petition has been physically present therein for periods totaling at least half of that time, and who has resided within the State in which the petitioner filed the petition for at least six months, (2) has resided continuously within the United States from the date of the petition up to the time of admission to citizenship, and (3) during all the periods referred to in this subsection has been and still is a person of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States.

See also Berenyi v. Immigration Director, 385 U.S. 630 (1967) (Burden of proving good moral character under this section is on the alien.)
281. 647 F.2d 432 (4th Cir. 1981).
282. Id. at 435.
283. Va. CODE § 18.2-361 (Supp. 1981) prohibits the commission of sodomy. The district court inferred that Nemetz committed sodomy from his admission that he had sexual relations with his roommate. The Fourth Circuit did not decide whether the inference was a proper one. 647 F.2d at 435 n.2.
determination of good moral character for naturalization purposes. While the United States Constitution mandates a "uniform rule of naturalization," Congress has traditionally deferred to the states in matters of public morality. The use of laws which vary from state to state, however, leads to inconsistent application of the naturalization laws. The court observed that had Nemetz lived in a state which did not prohibit private, consensual sodomy between adults, the INS would not have been able to oppose his naturalization on the ground of bad moral character. The Fourth Circuit concluded that state law cannot be employed to undermine a "uniform rule of naturalization." Thus whether an applicant for naturalization is of good moral character is a question of federal law.

For naturalization purposes, the federal courts can properly look to state law in the initial stage of determining whether a crime involves moral turpitude. The Nemetz court noted that crimes against the public are treated similarly throughout the country. In most cases the use of state law will not disrupt the uniformity requirement. But when private acts are in question, the problem of widely varying legislative treatment by the states arises. The Fourth Circuit suggested that in such cases the appropriate federal standard is whether the act is harmful to the public or merely offensive to personal morality. By barring a finding of good moral character only for those acts harmful to the public, the federal courts will be applying the naturalization laws in a uniform fashion. In addition, the court could find no support for the proposition that Congress intended homosexual acts to indicate bad moral character. Although the class of aliens "afflicted with... sexual deviation" are excludable from admission into the United States, this class was not included by Congress among the six classes which are absolute bars for a finding

285. 647 F.2d at 435.
286. The court noted that at least nine states (Illinois, Connecticut, Oregon, Colorado, Hawaii, Delaware, Ohio, North Dakota, and California) had decriminalized sodomy between adults, and in two others (New York, Pennsylvania) recent decisions had struck down as unconstitutional state statutes prohibiting such activity between unmarried adults. Id.
287. Id.
288. Id. at 436.
289. Id.
PROPOSED CHANGES IN THE IMMIGRATION LAWS

The most significant development in immigration in the next year may be a legislative overhaul of the Immigration and Nationality Act. The Select Commission on Immigration and Refugee Policy issued its final report on March 1, 1981. After analyzing the document, the interagency Task Force on Immigration and Refugee Policy reported to President Reagan. On July 30, 1981, the President announced the administration's immigration proposals, which will be submitted in a legislative package to Congress.292 Three of the proposals are of major significance.

Undocumented aliens who have been in the United States since before January 1, 1980, could apply for a new temporary status. A "renewable term temporary resident" could seek and hold employment, and renew this status every three years. This group would not have access to welfare, public housing, or food stamps, but would pay Social Security. After ten years' residence, regardless of when temporary status was obtained, the alien could apply for permanent resident status.293

A temporary "guest worker" program would also be established. For a two-year trial period, Mexican citizens would be admitted for temporary stays of up to one year. The program would have a ceiling of 50,000 such workers per year.

To meet the problem of employment of undocumented aliens, the administration has proposed employer sanctions. Fines of $500 to $1,000 could be imposed on employers of at least four employees for each offense. In addition, the Justice Department would be authorized to seek injunctions against those employers it could establish follow a "pattern or practice" of hiring undocumented aliens. The proposals, however, reject the requirement of a national identity card to aid in enforcement of these sanctions. Instead, the proposals provide a good faith defense for any employer who requests of the alien and examines certain specified documents.294

291. 8 U.S.C. § 1101(f) (1976), which limits the term "good moral character," lists only six of the 31 excludable classes of 8 U.S.C. § 1182(a) (1976), and (a)(4) is not one of them.

292. For further discussion of the proposals and a copy of the administration's press release, see 58 INTERPRETER RELEASES 379-80, 385-90 (1981).

293. Temporary resident aliens would not be permitted to bring in spouses or minor children under the proposal.

294. Documents which would satisfy this requirement are either documentation issued by INS or any two of the following: a birth certificate, a driver's license, a Social Security card or a Selective Service registration certificate.
CONCLUSION

The past year has been a very active one in the field of immigration law. The Supreme Court broadened the investigatory powers of border patrol officers. In addition, the Court halted the liberal trend of the lower courts' increasingly expansive definition of "extreme hardship", in favor of the Attorney General's narrower interpretation. Whether these rulings are an indication of a more conservative view of the immigration laws may be seen in the next term when the Court addresses the constitutionality of the mechanism for one-house congressional disapproval of suspension of deportation. The Court will also decide whether undocumented aliens are entitled to the equal protection of the laws.

A further factor to be considered in the future of immigration policy is the current movement to reduce the size and cost of government. The ability of the Immigration and Naturalization Service to patrol the country's borders is already severely hampered, and further budget cuts will only worsen the situation. In addition, the administration has mandated a government-wide reduction in the overall number of regulations, both those existing and those to be promulgated. Whether this will hinder the ability of the Service to implement its legislative mandates and to respond to problems as they arise remains to be seen.

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